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## **Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg?**

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### **I. Introduction**

An accession of the European Union to the European Convention on Human Rights (ECHR) has been a topic in legal circles for over thirty years.<sup>1</sup> The discussion first culminated in a request by the European Commission for an advisory opinion by the European Court of Justice (ECJ).<sup>2</sup> Yet in that opinion, the ECJ ruled out an accession in the absence of an explicit competence for the (then) European Community (EC)<sup>3</sup>. More than ten years after that opinion, the Treaty of Lisbon finally created such an explicit competence. According to the new Article 6 (2) of the Treaty on European Union (TEU), the Union shall accede to the European Convention on Human Rights. This means that there is not only a right for the EU to accede but also a duty, provided of course, an

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<sup>1</sup> Cf. e.g. Heribert Golsong, Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften, *Europäische Grundrechtezeitschrift* 1978, 346; European Commission, Memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Bulletin of the European Communities*, Supplement 2/79.

<sup>2</sup> ECJ, Opinion 2/94, ECR [1996] I-1759.

<sup>3</sup> For sake of legibility, this contribution generally refers to the European Union and European Union Law even where it strictly speaking discusses the law of the EC or the EEC.

accession is possible under the ECHR. Article 6 TEU has long referred to the ECHR as a source of inspiration for the Union's fundamental rights existing as general principles of Union law and a long list of decisions by the ECJ is proof of the importance the Convention has for the EU's fundamental rights regime.<sup>4</sup> The entry into force of the EU Charter of Fundamental Rights, which in Article 52 (3) refers to the ECHR as the minimum standard for the protection of human rights in the EU, consolidates the position of the ECHR in the EU and is a manifestation of the growing importance of human rights in Union's legal order.<sup>5</sup> Therefore, an accession to the ECHR constitutes the next logical step in this development. It sends a clear signal that the EU is ready for an external judicial review of its own regime of fundamental rights protection. This will not only enhance the credibility of the EU's human rights policy but also foster the coherence of human rights protection in Europe.<sup>6</sup>

The accession will be achieved with the conclusion of an accession treaty between the forty-seven parties to the Convention and the EU. The procedure, which the EU must follow, is set out in Article 218 of the Treaty on the Functioning of the EU (TFEU). Article 218 (8) provides that the Council must act unanimously when concluding the accession treaty after having obtained the consent of the European Parliament according to Article 218 (6) TFEU. In addition, the treaty must be approved by the Member States in accordance with their respective constitutional provisions. The question is, of

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<sup>4</sup> Starting with Case 4/73 *Nold v Commission* [1974] ECR 491; a detailed analysis of this case law can be found in Takis Tridimas, *The General Principles of EU Law*, 2nd. edn., OUP, Oxford 2006, 341 et seq.

<sup>5</sup> On the protection of fundamental rights in the EU so far, cf. Paul Craig, Gráinne de Búrca, *EU Law*, 4th edn., OUP, Oxford 2007, 379 et seq.

<sup>6</sup> European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human

course, whether in light of the duty to accede, the Member States are allowed to veto an accession. Considering that the Treaty is also binding on the Member States, they, too, are under a duty to ensure that an accession will take place. However, Article 6 (2) TEU does not specify the exact modalities of such an accession. For instance, it does not prescribe whether the EU accedes to the Convention only or also to some or all of its additional protocols. Other modalities, such as the question of an EU judge at the European Court of Human Rights (ECtHR) or the exact relationship between the two European courts, have also not been determined by the Lisbon Treaty. Therefore there may be some, albeit limited, room for a veto by a Member State's representative in the Council. It is also to be expected that one or more Member States will ask the ECJ for an opinion under Article 218 (11) TFEU on whether the accession treaty is compatible with the EU's treaties.

Changes not only took place in EU law. The European Convention needed to be adapted, too, in order to make an accession of the EU legally possible since originally the ECHR was only open to states. After Protocol No. 14 to the ECHR has entered into force on 1 June 2010, this obstacle to an accession has now been removed.<sup>7</sup> Further amendments to the Convention may, however, become necessary upon accession. It can be expected that the accession treaty will include the necessary modifications.<sup>8</sup>

Preparations for an accession are already under way. The Stockholm programme of the Council of the EU urges that "the rapid accession of the EU

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Rights and Fundamental Freedoms (2009/2241 (INI)), A7-0144/2010, at para. 1; European Commission, MEMO/10/84, 17 March 2010.

<sup>7</sup> The new Article 59 (2) ECHR reads: 'The European Union may accede to this Convention'.

<sup>8</sup> Cf. explanatory report to Protocol 14 (CETS No. 194).

to the European Convention on Human Rights is of key importance”.<sup>9</sup> Moreover, the European Parliament has adopted a resolution on the institutional aspects of an accession<sup>10</sup>. Negotiations started in early July 2010, only a month after an accession became legally possible.<sup>11</sup> The aim is that they are completed by June 2011.<sup>12</sup> Already in 2002 the Council of Europe’s Steering Committee for Human Rights (CDDH) issued a memorandum on the technical and legal issues of an accession<sup>13</sup> and has since kept an eye on the issue.<sup>14</sup>

This contribution is less concerned with the formalities of an accession but rather with a very practical question once an accession has taken place: who should be held responsible in Strasbourg in the event of an alleged violation of the ECHR brought about by EU law? I will first briefly discuss the present situation regarding the responsibility of the EU and its Member States for violations of the ECHR. I will then go on to discuss who should be held responsible for actions and omissions resulting in a violation of the Convention: the EU or the Member States.

## **II. Responsibility for violations of the ECHR: the Present Situation**

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<sup>9</sup> Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2 December 2009, doc. 17024/09.

<sup>10</sup> European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241 (INI)), A7-0144/2010.

<sup>11</sup> Council of Europe, press release 545(2010), 7 July 2010, the Council had issued the Commission with a mandate for negotiation on 4 June 2010 with negotiation directives (Document 9689/10), which are classified.

<sup>12</sup> CDDH(2010)010, para 25.

<sup>13</sup> CDDH, Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2.

<sup>14</sup> E.g. CDDH-BU(2009)002, at p. 16; the CDDH is actively involved in the discussions on accession, cf. for instance CDDH-BU(2010)002.

As the EU is presently not a party to the ECHR, it cannot be held directly responsible for violations of the Convention caused by EU primary or secondary law or other EU activities (executive or judicial). Any complaint directed against the EU is inadmissible *ratione personae*.<sup>15</sup> However, the European Court of Human Rights holds the EU's Member States responsible for human rights violations originating in EU law. In the *Matthews* case the ECtHR held a Member State of the European Union responsible for a breach of the Convention brought about by EU primary law. The violation was rooted in the EC Act on Direct Elections of 1976, a treaty concluded by all the EU member states at the time. The Court in *Matthews* expressly stated:

The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.<sup>16</sup>

This case law was modified in the *Bosphorus* case. In contrast to *Matthews*, the violation in *Bosphorus* could not be found directly in EU primary law, i.e. the treaties, but in secondary law, i.e. an act adopted by the institutions of the EU.<sup>17</sup> *Bosphorus* was concerned with the impounding of an aircraft by Ireland on the basis of an obligation in an EC regulation, which itself was based on a Resolution by the United Nations (UN) Security Council.<sup>18</sup> Because the aircraft was impounded by Irish authorities on Irish territory, the ECtHR had no difficulty finding that the applicant company was

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<sup>15</sup> Cf. European Commission of Human Rights, *CFTD v European Communities, alternatively: their Member States* (App no 8030/77), 10 July 1978, para 3.

<sup>16</sup> *Matthews v United Kingdom* (App no 24833/94), 18 February 1999, para 32.

<sup>17</sup> *Matthews*, para. 157.

<sup>18</sup> *Bosphorus v Ireland* (App no 45036/98), 30 June 2005.

within Ireland's jurisdiction according to Article 1 of the European Convention on Human Rights (ECHR). As a consequence Ireland could generally be held responsible for impounding the aircraft and any violation of the ECHR that arose therefrom. The ECtHR then famously held that the Contracting Parties to the ECHR are not prohibited from transferring sovereign power to an international organisation but that they remain responsible for all acts and omissions of their organs 'regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international legal obligations'.<sup>19</sup> The Court went on to state that as long as the international organisation 'is considered to protect fundamental rights [...] in a manner which can be considered at least equivalent to that for which the Convention provides' the Court will presume that a State has acted in compliance with the Convention, where the state had no discretion in implementing the legal obligations flowing from its membership of the organisation.<sup>20</sup> That presumption can, however, be rebutted where the protection in the particular case is regarded as 'manifestly deficient'.<sup>21</sup> The Court thus introduced a two stage test: at the first stage the Court examines whether an organisation provides an equivalent protection, which will lead to the presumption to apply. At the second stage the Court examines whether that presumption has been rebutted in the concrete case before it because of a manifest deficit in the protection of human rights. In the *Bosphorus* case, the ECtHR considered the human rights protection afforded by the European Union to be equivalent to that of the Convention, so that the presumption

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<sup>19</sup> *Bosphorus*, para. 153.

<sup>20</sup> *Bosphorus*, paras. 155 and 156.

<sup>21</sup> *Bosphorus*, para. 156.

applied. The Court saw no reason why the protection in that case could be considered manifestly deficient.<sup>22</sup> Therefore, the ECtHR held that the interference with the applicant's property rights protected by Article 1 of Protocol 1 ECHR was justified.

The more recent case of *Connolly* introduced an important distinction.<sup>23</sup> *Connolly* dealt with a labour dispute between an employee of the European Commission and the European Communities. The applicant took his complaint to the Court of First Instance and to the European Court of Justice where his request to submit written observations to the opinion of the Advocate General was denied. He then took a case against all the (then) member states to Strasbourg claiming a violation of Article 6 ECHR. The Court of Human Rights, however, made it clear that the Member States can only be held responsible where there was a domestic act of some sort,<sup>24</sup> which means that in cases where only the EU acted, such action would be immune from Strasbourg's scrutiny. The reason for this is that EU action could not be attributed to the Member States and did thus not fall into their jurisdiction under Article 1 ECHR.<sup>25</sup>

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<sup>22</sup> *Bosphorus*, paras. 159-166; on other cases, in which the presumption was applied, cf. Tobias Lock, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, 10 *Human Rights Law Review* (2010), 529.

<sup>23</sup> *Connolly v 15 Member States of the European Union* (App no 73274/01) (Section V), 9 December 2008, confirmed in: *Beygo v 46 Member States of the Council of Europe* (App no 36099/06) (Section V), 16 June 2009, and *Rambus Inc. v Germany* (App no 40382/04) (Section V), 16 June 2009.

<sup>24</sup> It is clear from *Kokkelvisserij* that a request for a preliminary reference by a national court qualifies as a domestic act, cf. *Kokkelvisserij v Netherlands* (App no 13645/05) (Section III), 20 January 2009.

<sup>25</sup> In *Connolly*, the ECtHR followed its rulings in *Boivin v 34 Member States of the Council of Europe* (App no 73250/01) 9 September 2008 and *Behrami and Behrami v France* (App no 71412/01) and *Saramati v France, Germany and Norway* (App no 78166/01), 2 May 2007.



### **III. After an Accession: Who would be responsible in Strasbourg?**

An accession to the ECHR would close the gap in the human rights protection against EU actions and omissions, which became evident in *Connolly*. The EU would in such a case be directly subjected to the control mechanisms established by the Convention. Individual applications directed against the EU would thus no longer be inadmissible.

Cases such as *Connolly* will not cause many problems in the future. The problematic questions with which this contribution is mainly concerned are (1) what will happen in situations like in *Bosphorus* where a Member State has acted but where that action was rooted in an obligation resulting from EU law; (2) whether the Member States should remain responsible under the Convention in cases like *Matthews* where the violation of the ECHR can be found in primary EU law and (3) how omissions should be dealt with.

#### **1. Member State Action**

Most cases involving EU law will reach the ECtHR via the individual complaints procedure provided for in Article 34 ECHR. Under that procedure, it is for the complainant to designate the respondent.<sup>26</sup> Normally the question of the correct respondent can be answered very easily: It is the party, whose authorities have acted. But once the EU has acceded to the ECHR the question arises how the responsibility between the Member States and the EU should be split. The EU only rarely acts vis-à-vis the individual. It is usually the Member States which execute obligations arising from EU law. This can for instance mean that an authority of a Member State executes

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<sup>26</sup> Article 47 of the ECtHR's Rules of Court.

directly applicable EU law, such as the Treaties or regulations. Another example would be that the Member States' legislature implements an EU directive, which is then executed by the Member States' authorities. To complicate things further, in many cases which come before the ECtHR, e.g. those involving criminal or family law, the respondent Member State will have acted in the absence of any EU legal obligations but out of its own sovereign right. The question is therefore, in which cases, if any, the EU should be held responsible and in which cases the Member State. Or should there be a joint or a joint and several liability?

Where a Member State violates the Convention, an applicant will in the future have to make a decision whom to hold responsible before the ECtHR: the EU or the Member State. The problem has been foreseen by the drafters of the Lisbon Treaty. Art 1 (b) of the Protocol to the Lisbon Treaty on accession to the ECHR provides:

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: [...] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.<sup>27</sup>

The question of course is, who the 'appropriate' addressee is. Various proposals have recently been made during hearings held in the European

Parliament but also by the Council of Europe's Steering Committee for Human Rights. Some of these proposals involve changes to the present procedure, such as the introduction of a co-respondent model or other mechanisms. I shall first discuss solutions which would not necessitate further amendments to the ECHR.

#### **a. Solutions on the basis of the present ECHR**

The starting point for this discussion is Art. 1 ECHR, which reads:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Based on Article 1 ECHR, the obvious solution would be to examine in each case whether the action fell into the jurisdiction of the Member State or into the jurisdiction of the European Union.

##### **aa. The EU's division of competences**

Therefore, one possibility would be to attribute responsibility according to the EU's internal division of competences. Where the EU had the competence to legislate, the EU would be the correct respondent; where the Member States had that competence, they would be responsible. This would at first glance have the advantage of holding that party responsible which is truly to blame for the violation and which could also remove it.

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<sup>27</sup> Protocol (No. 8) relating to Article 6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and

### **(1) The ECHR as a mixed agreement?**

The attribution of responsibility according to the internal division of competences is indeed one of the solutions discussed for the attribution of responsibility in case of a violation of a mixed agreement. Mixed agreements are usually concluded because neither the EU nor the Member States have the competence to conclude the agreement alone.<sup>28</sup> There are no clear rules governing the responsibility for violations of such agreements under international treaty law or customary international law.<sup>29</sup> The case law of the international courts or the ECJ is not fully conclusive either. In the absence of a declaration of competence by the EU and its Member States, there is some case law that indicates a joint and several responsibility of the EU and its Member States.<sup>30</sup> However, in other cases, at least some WTO panels seem to have accepted a sole responsibility of the EU in matters, which fell into its competence.<sup>31</sup>

I would argue that with regard to the ECHR, a solution in accordance with the internal distribution of competences is not appropriate. It is arguable that after an accession by the EU the ECHR can be called a mixed agreement as both the Member States and the EU will be parties to it. However, the ECHR will be an unusual type of mixed agreement. Atypically, the reason why both the EU and the Member States will have become parties to the

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Fundamental Freedoms [2010] OJ 83/273.

<sup>28</sup> Koutrakos, *EU International Relations Law*, Hart 2006, 137; Eeckhout, *External Relations of the European Union*, OUP 2004, 191; a famous example were the WTO agreements, cf. ECJ, Opinion 1/94, [1994] ECR I-5267.

<sup>29</sup> Cf. the discussions in the International Law Commission on the responsibility of international organisations, ILC A/64/10, 2009, Chapter 4.

<sup>30</sup> E.g. ECJ, Ruling 1/78 [1978] ECR 2151, para 35; Pieter Jan Kuijper, *International Responsibility for EU Mixed Agreements*, in: Christophe Hillion/Panos Koutrakos (eds.), *Mixed Agreements Revisited*, Hart 2010, 208; arguments for a joint and several responsibility can be found in: Eva Steinberger, *The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO*, 17 EJIL (2006), 837.

ECHR is not the lack of competence of either to accede to the ECHR alone but the desire to ensure a complete protection of human rights. There is no reason to doubt that they are externally fully responsible for violations of the ECHR. It would therefore not make sense to base the question of responsibility on the internal division of competences.

In addition, under this solution the advantage of holding the party responsible which is truly to blame for the violation mentioned above is not existent in all cases. This contention would only be true if the violation could be found in the EU's legislation itself and where the Member State had no discretion in the implementation of that legislation. Where the Member State enjoyed some discretion in the implementation of EU law, the violation was not necessarily caused by EU law. The Member State may well have exercised its discretion in a way, which violated the Convention. In such a case, it would be appropriate to hold the Member State responsible alongside the EU.

## **(2) The autonomy of European Union law**

Moreover, there would be the additional problem that the Court of Justice of the European Union regards EU law to be autonomous. The ECJ initially employed the concept of autonomy to establish the primacy of EU law over the national laws of the Member States. In *Costa v ENEL* it made its famous statement that 'the law stemming from the treaty [is] and independent source of law' ('une source autonome' in the original French).<sup>32</sup> In Opinion 1/91, the ECJ referred to the concept of autonomy for the first time with regard to the

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<sup>31</sup> Cf. Kuijper, 213 et seq.

relationship between EU law and international law.<sup>33</sup> In that Opinion, the Court used the autonomy of the European Union's legal order to strike down the first draft agreement on the European Economic Area (EEA). The ECJ made three arguments based on that autonomy: the first argument related to the ECJ's exclusive jurisdiction to allocate responsibility between the EU and the Member States; the second was concerned with the exclusivity of the ECJ's jurisdiction to interpret the EU Treaties; the third and final argument addressed the limits which the autonomy of EU law sets to the transfer of new powers on the EU's institutions outside the amendment procedure found in Article 48 TEU (then Article 236 EEC Treaty).

The agreement provided for the establishment of an EEA Court, which would have had jurisdiction to interpret the agreement in disputes between the 'contracting parties'. The contracting parties were the member states of the European Free Trade Association (EFTA), the EU (the then EEC) and its Member States. In a dispute involving the EU or one of its Member States, the term 'contracting party' could either mean the EU, a Member State or both together, depending on the distribution of competences within the EU. The ECJ held that the autonomy of EU law stood in the way of such a provision since the allocation of responsibility between the EU and its Member States, which had to be made on the basis of the EU Treaties, fell into the ECJ's exclusive jurisdiction under Articles 19 (1) TEU (ex Article 220 TEC) and 344 TFEU (ex Article 292 TEC). Thus this part of the agreement was incompatible with the autonomy of EU law.<sup>34</sup>

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<sup>32</sup> ECJ, Case 6/64 [1964] ECR 585 (Costa v ENEL).

<sup>33</sup> Opinion 1/91 [1991] ECR I-6079.

<sup>34</sup> ECJ, Opinion 1/91 [1991] ECR I-6079, paras 34-35.

Furthermore, the ECJ considered it to be incompatible with its own exclusive jurisdiction that the EEA Court would be given jurisdiction to interpret provisions of the EEA agreement, which were identical to provisions found in EU law concerning trade and economic relations.<sup>35</sup> The EEA Court itself would not have been bound by the ECJ's interpretation of these identical provisions. Considering that the EU, and thus the ECJ, would have been bound by a decision of the EEA Court interpreting these provisions, there would have been a risk of undermining the autonomy of EU law.<sup>36</sup>

The last argument was concerned with the right granted to the national courts of the EFTA member states concluding the agreement to ask the ECJ for a preliminary ruling on these identical provisions. The ECJ held that the autonomy of EU law was affected because the agreement did not provide that the ruling of the ECJ had to be binding on the domestic court. While the ECJ was willing to accept that an agreement could confer new powers on the EU's institutions, it considered that the powers conferred on the ECJ by the draft agreement would essentially change the function of the court. Such changes to the institutions of the EU could, however, only be made by way of a Treaty amendment, according to the rules found in Article 48 TEU.<sup>37</sup> Based on this aspect of autonomy, the ECJ in *Kadi* found that an agreement must not prejudice the constitutional principles of the Treaty, including the respect for

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<sup>35</sup> ECJ, Opinion 1/91 [1991] ECR I-6079, para 41.

<sup>36</sup> ECJ, Opinion 1/91 [1991] ECR I-6079, para 39; in Opinion 1/92, which concerned a revised version of the draft agreement on the EEA, the ECJ highlighted the importance of a provision, which spelt out that the ECJ was not to be bound by the case law of the dispute settlement body provided for in the agreement, as an 'essential safeguard which is indispensable for the autonomy of the [EU] legal order', Opinion 1/92 [1992] ECR I-2825, para 24.

<sup>37</sup> ECJ, Opinion 1/91 [1991] ECR I-6079, paras 58-61; confirmed in Opinion 1/00 [2002] ECR I-3493, para 22.

fundamental rights.<sup>38</sup> It follows that the autonomy of EU law preserves the EU's internal hierarchy of norms with primary law at the top, trumping agreements concluded by the EU and secondary law.<sup>39</sup>

An accession treaty concluded by the EU would have to respect the autonomy of EU law as formulated by the ECJ. It is submitted that this is how Protocol No. 8 to the Lisbon Treaty must be understood when it states that the 'specific characteristics of the Union and Union law' must be preserved.<sup>40</sup> It can in particular be expected that a solution that would allow the Strasbourg Court to allocate responsibility according to the EU's internal division of competences, would not be considered compatible with the Treaties.<sup>41</sup> Therefore a solution, according to which the correct respondent would be determined on the basis of the internal distribution of competences between the Member States and the EU is not workable.

Before this background, a proposal for an operative provision in the accession treaty made in preparation of a working meeting between the

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<sup>38</sup> ECJ, Joined Cases 402/05 P and 415/05 P [2008] ECR I-6351, paras 282-285 (Kadi and al Barakaat v Council).

<sup>39</sup> Cf. ECJ, Case C-122/95, [1998] ECR I-973; Bruno de Witte, *European Union Law: How Autonomous is its Legal Order?*, 65 Zeitschrift für Öffentliches Recht (2010), 141, 153.

<sup>40</sup> Protocol (No. 8) relating to Article 6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C 83/273.

<sup>41</sup> This was again highlighted in European Parliament's resolution of 19 May 2010 on the institutional aspects of an accession to the ECHR (P7\_TA-PROV(2010)0184) and by Jean-Paul Jacqué made at a hearing before the European Parliament's Committee on Constitutional Affairs, 18 March 2010 <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO>; the same problem would arise if the proposal by Jonas Christofferson (Danish Human Rights Institute) at the same hearing were followed. He argued that where the line of division between the EU's and the Member State's responsibility is not clear, it would be for the ECtHR to decide.



Commission and a CDDH working group may prove problematic.<sup>42</sup> The proposal states:

The obligations of the European Union under the Convention and its protocols shall only relate to acts and measures [...]to the extent that the European Union would have had competence to perform an act or measure, a failure to do so.

This proposal is clearly designed to avoid that the EU would be held responsible for actions or omissions, which are not internally attributable to it. However, it might prove counter-productive as the ECtHR would be required to interpret the scope of the Union's accession to the ECHR, which would necessitate an interpretation of the allocation of competences under the EU Treaties. The ECJ would probably consider the ECtHR's jurisdiction in this respect to constitute an unlawful intrusion of the autonomy of EU law.

## **bb. Declaration of Competence**

One suggestion made by European Parliament's Committee on Foreign Affairs that individuals and non-Member States should be informed of the division of responsibility by means of a declaration of competence.<sup>43</sup> Such a declaration would circumvent the issue of the ECtHR interpreting the EU's treaties and delineating the division of competence within the EU since the ECtHR's finding would be based on the declaration as a separate legal

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<sup>42</sup> Draft elements prepared by the Secretariat on General Issues and on Technical adaptations to provisions of the ECHR and other instruments with respect to the EU as a contracting party, CDDH-UE(2010)07.

<sup>43</sup> Draft Opinion of the Committee on Foreign Affairs for the Committee on Constitutional Affairs on institutional aspects of the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of 9 February 2010, (2009/2241(INI)); confirmed by the European Parliament, resolution of 19 May 2010 on the institutional aspects of an accession to the ECHR (P7\_TA-PROV(2010)0184).

instrument and not on the Treaties. However, as has just been outlined, a division of responsibility along the lines of the internal competence to legislate is not an appropriate solution for the ECHR.

In addition, there would be a practical issue. Declarations of competence tend to be rather vague. For instance the declaration of competence regarding the Convention on access to information, public participation in decision-making and access to justice in environmental matters states:

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force. The exercise of Community competence is, by its nature, subject to continuous development.<sup>44</sup>

Such a declaration would clearly not be of much help to an individual applicant: They would have to find out whether the obligation in question is covered by EU law, which can be a complicated endeavour, especially considering that individual applicants before the ECtHR do not need a legal representative. Even more elaborate declarations would not necessarily be easier to understand. In addition, such declarations usually include the caveat that the division of competence between the Member States and the EU is “subject to continuous development”.<sup>45</sup> This would mean that an applicant, and later the ECtHR, would have to research the latest developments in EU law in order to make an informed decision. This would again endanger the autonomy of EU law as outlined above.

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<sup>44</sup> Council Decision of 17 February 2005, [2005] OJ L 124/1.

<sup>45</sup> E.g. in the EU's declaration of competence under Annex IX of the United Nations Convention on the Law of the Sea, [1998] OJ L 179/129.

### **cc. Joint Liability**

A joint liability of the EU and the Member State could provide a solution. It would have the advantage that both the EU and the Member State would be bound by a decision finding that there was a violation and they would thus both be under an obligation to remove it. In addition, there would be no need for the ECtHR to interpret EU law and rule on the division of competences between Member States and the Union. However, a joint responsibility has one considerable disadvantage: in cases which are unrelated to EU law (e.g. a case alleging torture during an interrogation by the police) an applicant would have to hold both the EU and the Member State to account. In such cases the EU has a vested interest in not being a party to such a dispute. Any conviction of a party by the ECtHR carries with it a condemnation of that party's legal system, which failed to remove the violation itself. It would be hard for the EU to accept that it could alone be held responsible for violations caused by its Member States in areas which have no relationship to EU law at all. Thus such a solution, albeit legally possible, would hardly be politically acceptable for the EU. Hence there are good arguments against the introduction of a joint liability.

### **dd. Joint and Several Liability**

An alternative would be the introduction of a joint and several liability. This would mean that an applicant could either hold the Member State responsible, or the EU, or both at the same time regardless of who actually caused the

alleged violation. The EU and the Member States would have to come to an internal attribution of liability.

From the applicant's point of view, this solution would be effective. The chosen respondent would be fully responsible. However, there are downsides to the adoption of this type of liability as well. Again, there will be cases which have no connection to EU law whatsoever. Any solution politically acceptable to the EU would have to make sure that such cases are not directed against the EU. But this would mean that there would have to be some tangible criterion which would enable an applicant to decide whether to direct the complaint against both the EU and the Member State or only the Member State. No such criterion exists. Thus there would be the same problem as with a joint liability if a joint and several responsibility were adopted.

#### **ee. A solution based on the needs of the applicant**

In my eyes, the solution to the question should bear in mind the situation of an individual applicant. Applications can be made without the instruction of counsel.<sup>46</sup> It must therefore be ensured that an applicant who has no legal training is capable of filing an admissible application. Therefore, the designation of the correct respondent should not place a huge burden on the applicant.

Thus the proposed solution would be to allow the claimant to hold that party responsible which has acted in the concrete case. Where the EU's institutions have acted, the application must be directed against the EU. Where a Member State has implemented obligations flowing from EU law,

that Member State can be held responsible even if the actual violation is rooted in EU law.

This solution has a number of advantages over the solutions discussed above. It reduces the burden on the applicant in identifying the correct respondent. Whenever a Member State has acted vis-à-vis the applicant, the applicant can hold that Member State responsible under the ECHR, independent of whether the Member State acted implementing EU law or not. Of course, if this solution were adopted, a Member State would not be allowed to defend its actions by referring to its duty to follow obligations flowing from EU law. Furthermore, the applicant would have no difficulty in identifying the appropriate domestic remedy and they could thus easily comply with the requirements of Art. 35 ECHR. This would also underline the subsidiarity of the external control exercised by the ECtHR. There are usually several instances at national level. In addition, domestic courts have the right, and in case of a court of last resort, the duty to make a request for a preliminary reference to the ECJ under Article 267 TFEU. The ECJ would thus have the opportunity to remedy the violation should that violation be rooted in EU law. This would mean that the ECtHR would normally only decide where both the courts of the Member States and the ECJ did not find a violation. This solution would thus help to minimise the convictions of the EU and its Member States.

This solution would also preserve the autonomy of EU law as outlined above because the Strasbourg Court would not be called upon to delineate the EU's and the Member States competences. It would also rule out cases

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<sup>46</sup> Joachim Abr. Frowein/Wolfgang Peukert, Europäische Menschenrechtskonvention,

of EU responsibility for violations of the ECHR by a Member State acting without any connection to its obligations under Union law.

Most importantly, the solution would avoid hampering the effective protection of human rights: an applicant would not have to run the risk of addressing their application against the wrong respondent because the applicant misconstrued the division of competences between the EU and its Member States. It would have the further advantage that actions of the Member States would not have to be categorised into those where the Member State acted out of its own sovereignty (e.g. where the applicant was convicted for theft) and where the Member State's action was prompted by EU law (e.g. where the applicant's airplane was impounded in accordance with an EU regulation).

A similar proposal has been made by the European Parliament's Committee on Constitutional Affairs:

[...] any application by a citizen of the Union concerning an act or failure to act by an institution or body of the Union should be directed solely against the latter and that similarly any application concerning a measure by means of which a Member State implements the law of the Union should be directed solely against the Member State, without prejudice to the principle that, where the way in which responsibility for the act concerned is shared between the Union and the Member State is not clearly defined, an application may be brought simultaneously against the Union and the Member State.<sup>47</sup>

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3rd edn., N.P. Engel Verlag 2009, Art. 34, para 66.

<sup>47</sup> Draft Report on the institutional aspects of accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2 February 2010 (2009/2241 (INI)), at para 7; this report was adopted by the European Parliament on 19 May 2010, P7\_TA-PROV(2010)0184.

What is surprising, however, is the final clause where it is provided that an applicant may bring an application against both the Union and the Member State concerned where responsibility of the act is shared between the Union and the Member State. It is not clear, which cases should be covered by this proviso. An individual applicant will usually only deal with either the authorities of a Member State or with EU authorities. Given that such a clear-cut approach has the advantages outlined above, there is no need to resort to shared responsibility for the act concerned. This proposal could even prove counter-productive and complicate proceedings further because it is not clear which domestic remedies need to be exhausted under Article 35 ECHR, which requires an applicant to exhaust all domestic remedies before they can file their complaint. Should an applicant therefore exhaust those before the Member State's courts or those before the EU's courts or both?

## **b. Solutions involving changes to the ECHR**

As shown above, a workable solution to the difficulty of determining the correct respondent in cases of Member State action involving EU law, can be found on the basis of the ECHR as it stands. However, in the discussion on the EU's accession, proposals necessitating amendments to the ECHR or the ECtHR's Rules of Court have been made, which warrant some comments.

### **aa. Preliminary Reference to the ECJ**

One proposal made in the past was that 'there would have to be a machinery enabling [the EU] and its Member States to determine the division of

competence before the Convention authorities.’<sup>48</sup> The Human Rights Court would either ask the EU and the Member State affected to declare in each and every case who is the correct respondent or there would be a judicial mechanism by which the ECJ could be asked to delineate the respective competences. A similar proposal was made by Judge Timmermans of the ECJ, which would allow the Commission to request an opinion from the ECJ while the Strasbourg Court would suspend proceedings until the ECJ has decided.<sup>49</sup> These proposals are clearly based on the assumption that the correct respondent is the party which had the competence to act under EU law. They would have the advantage of preserving the autonomy of EU law since every delineation of these competences would be made by an institution of the EU.

However, apart from being time-consuming, this proposal would lead to one difficulty: Under Art 35 ECHR the applicant of an individual complaint has to exhaust all domestic remedies before they can file the complaint. In the case of the EU, this would either be remedies before the Union courts (e.g. according to Art. 263 TFEU), or before the courts of the Member State depending on who is the respondent in Strasbourg. However, under this

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<sup>48</sup> The proposal was made by Belgium in her submissions to the ECJ’s Opinion 2/94, [1996] ECR I-1759, para. I-6 (Accession of the European Communities to the ECHR); it appears to be modelled on Art 6 (2) of Annex IX to the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, according to which every state party has right to request from an international organisation and its Member States for information as to who has responsibility; a similarly phrased proposal was more recently made by the ECJ, Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, para 9, available at: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf).

<sup>49</sup> Christiaan Timmermans, *L’adhésion de l’Union Européenne à la Convention européenne des Droits de l’homme*, at a hearing before the European Parliament’s Committee on Constitutional Affairs, 18 March 2010 <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO>.



proposal, the true respondent would only be known after the application has been made. Thus it does not seem to be workable in practice.

## **bb. The Co-Respondent Model**

In addition to its proposal quoted above, the Committee on Constitutional Affairs also recommends that in any case brought against a Member State, the EU may join that Member State as a co-respondent with leave of the Court, and vice versa.<sup>50</sup> This idea seems to have first been devised in a report on the technical and legal issues of a possible EU accession to the ECHR by the Council of Europe's Steering Committee for Human Rights (CDDH).<sup>51</sup> In cases directed against a Member State, which at least potentially involve EU law, this proposal would allow for the EU to be designated as a co-respondent.<sup>52</sup>

Under the current ECHR, there is only the possibility for a party to the Convention whose national is an applicant in proceedings against another party, to submit written comments and take part in the hearings. This so-called third party intervention is laid down in Article 36 ECHR.<sup>53</sup> In cases brought by an EU national against a Member State, the EU would have the right to intervene since according to Article 20 (1) TFEU every person holding the nationality of a Member State also has EU citizenship.<sup>54</sup> The EU's

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<sup>50</sup> *ibid* at para 8.

<sup>51</sup> CDDH(2002)010 Addendum 2 (28 June 2002), para 57 et seq; the CDDH refers to the 'co-defendant'; this author prefers the name 'co-respondent'.

<sup>52</sup> There is no real need to apply this model to cases where the EU was designated as the respondent as under my proposal this would only ever be the case where the EU acted.

<sup>53</sup> The third party intervention is the solution preferred by the French Senator *Robert Badinter*, French Senate, Communication de M. Robert Badinter sur le mandat de négociation (E 5248'), 25 May 2010, available at: <http://www.senat.fr/europe/r25052010.html#toc1>.

<sup>54</sup> It has, however, been suggested not to regard EU citizens as 'nationals' of the EU in that sense, cf. Summary of Discussions, Informal meeting of member states' representatives in the CDDH (4 May 2010), CDDH-BU (2010)002, Appendix VII, p. 35.

comments in cases brought against a Member State which acted in pursuit of its EU law obligations, may prove to be particularly helpful to the Court. The third party intervention, however, has considerable weaknesses compared with the proposed co-respondent model. Firstly, there is no obligation to join the proceedings as a third party while under the co-respondent model such an obligation would exist. Secondly, the decision of the Court does not become *res judicata* for the third party whereas under the co-respondent model that would be the case. The co-respondent would thus be obliged to remove the violation as is the defendant originally designated by the applicant. In addition, the applicant would not be able to bring another complaint regarding the same violation against the co-respondent alone. Thirdly, there is only a right to intervene where the applicant is an EU national. Especially in asylum cases, in which applications to the ECHR are likely to happen, such an intervention would be dependent on an invitation by the President of the Court.<sup>55</sup>

In all cases involving EU law, the co-respondent model would clearly enhance the effective protection of human rights. Under my proposal outlined above, it may well happen that a Member State will be held responsible for violations of the ECHR which are actually rooted in EU law. Situations like the *Bosphorus* case provide a good example.<sup>56</sup> In that case Ireland as the respondent strictly followed its obligations flowing from EU law and had no discretion. Had the ECtHR found a violation in that case, Ireland would have faced this problem: It would have been obliged to release the aircraft under the ECHR but at the same time would have still been under the obligation to impound the aircraft under the EC regulation. As soon as the released aircraft

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<sup>55</sup> Cf. Article 36 (2) ECHR.

would have landed in another Member State, that Member State would have been obliged under EU law to impound it again. Therefore, Ireland would not alone have been able to remedy the situation as the only lasting remedy would have been a revocation or alteration of the regulation. Would such a case come to Strasbourg after an accession and would the EU be made a co-respondent, the EU itself would be bound to remedy the violation. This example shows that the co-respondent model would be a worthwhile addition to the ECHR.

I do not share the fear voiced by the French Senator *Robert Badinter* that the introduction of the co-respondent model would be problematic since every conviction of the EU would be equivalent to the conviction of all Member States since the EU was a Union of states.<sup>57</sup> This argument appears to overlook that the EU has its own legal personality and as a supranational organisation is not only a Union of states. Furthermore, I do not see why a conviction of the EU as a Union of states, should have a different quality to the conviction of a single member state. I would argue, to the contrary, that the present situation where a Member State can be convicted in lieu of the Union (and other Member States) is problematic. In extreme cases a Member State can even be convicted for violations caused by EU law, which, because of the prevailing qualified voting in the Council of the EU, may have entered into force against the express will of that state.

Having established that the co-respondent model would be a welcome solution for the attribution of responsibility, the question remains of who should decide about making the EU a co-respondent? The CDDH correctly

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<sup>56</sup> *Bosphorus v Ireland* (App no 45036/98), 30 June 2005.

noted that such a finding by the ECtHR might be regarded as a pre-judgment.<sup>58</sup> This leaves us with two possible solutions: either the respondent Member State may decide or the EU itself.

In my view, the decision should generally lie with the respondent Member State. Where that state believes that the alleged violation is, at least partly, attributable to the EU, it should have the right to ask the EU to join the proceedings as a respondent. Of course, this possibility is prone to abuse. However, under the duty of loyalty in EU law laid down in Article 4 (3) TEU, the Member State will arguably be banned from doing so in cases which have no connection to EU law whatever. Further, the designation of the EU as a co-respondent would in such a case have to be considered as an abuse of process. Thus the ECtHR would have the right to deny the Member State's request in exceptional cases.

Whether the EU should also have a right to join in the absence of a request by the respondent Member State, would need to be decided as well. In view of Article 36 ECHR, which provides for a third party intervention, one could come to the conclusion that this would not be necessary as the EU could make its opinion known through this mechanism. Yet Article 36 (1) ECHR only gives the EU a right to join proceedings where one of its citizens is a claimant. In all other cases, the EU's intervention would depend on a discretionary decision by the President of the Court. While there is a relatively liberal practice in this respect<sup>59</sup>, there is no reason for not granting the EU the right to join as a co-respondent. Thus I would argue that both, the EU and the

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<sup>57</sup> Badinter, n 53.

<sup>58</sup> CDDH at para 59.

<sup>59</sup> On that liberal practice cf. David Harris/Michael O'Boyle/Ed Bates/Carla Buckley (eds.), *Law of the European Convention on Human Rights*, 2nd edn., OUP, Oxford 2009, 855.

Member State should be allowed to designate the EU as a co-respondent in a case before the ECtHR.

## **2. Responsibility for violations found in primary EU law**

Another open question is whether the EU should also be responsible for violations of the ECHR caused by primary EU law, i.e. the Treaties and other documents, which have the same legal status. The French government's suggestion that primary law should be excluded from the acts reviewable by Strasbourg, is in my eyes not beneficial.<sup>60</sup> Translated into the national context it would remove the constitution of a party to the Convention from the ECtHR's control. There is no reason why that would be desirable. Constitutions are generally not open to judicial review, even by constitutional courts. Therefore, the lack of a previous decision by the ECJ cannot be a good reason to exclude primary law. Furthermore, it will often be hard to distinguish where exactly the violation lies, primary or secondary law. An exact delineation would have to be carried out by the ECtHR, which could endanger the autonomy of EU law since it is the ECJ's monopoly to interpret European Union law. Thus an exclusion of primary law from the jurisdiction of the ECtHR could prove counterproductive.

The difference to cases involving secondary EU law is that violations can only be remedied through a Treaty amendment following the procedure set out in Article 48 TEU. Normally such an amendment requires the consent of and ratification by all Member States. This means that the EU institutions cannot remove the violation by themselves. They are dependent on the

Member States. This has already been acknowledged in the *Matthews* case, where the EU Act on Direct Elections was held to violate the right to free elections of Article 3 of the First Protocol to the ECHR and the United Kingdom as a Member State of the EU was held responsible for that violation. Since the EU itself cannot amend the Treaties, one could argue that it should not be held responsible.<sup>61</sup> On the other hand, parties to the Convention are generally responsible for their own constitutions. Yet the difference lies in the fact that these constitutions can be amended by internal procedures and are not dependent on the conclusion of an amending treaty between states. But if we currently accept that the Member States are responsible for EU action, which they merely implemented and where they had no discretion, there is no reason why in turn the EU should not be held responsible for its own primary law. In addition, from the perspective of an applicant, it may be difficult to ascertain whether a violation was rooted in EU primary law or in secondary law (which was made on the basis of primary law) or whether the violation was caused by the Member State while implementing EU Law. For the question of the correct respondent, we should therefore apply the solution found above: where a Member State acted, that Member State is the correct respondent; where the EU acted, it is the EU. This should be independent of whether the alleged violation is found in primary or secondary law.

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<sup>60</sup> That such an exclusion was mooted by the government of France is alluded to by Badinter, n 53.

<sup>61</sup> It has thus been argued that therefore only the Member States are responsible, cf. *Matthias Königeter*, Völkerrechtliche und innerstaatliche Probleme eines Beitritts der Europäischen Union zur EMRK, in: Jürgen Bast (ed.), *Die Europäische Verfassung, Verfassungen in Europa*, Nomos-Verlag, Baden-Baden 2005, 230, 245.

### 3. Omissions

So far, the discussion has focused on the responsibility for interferences with human rights through actions. Should the same principles apply where the applicant alleges an omission? The ECHR can also be violated where one of the contracting parties omitted to take action when it had a positive obligation to do so. Some of the rights guaranteed in the Convention explicitly contain such obligations, for instance Articles 6 and 13 ECHR. Article 6 ECHR *inter alia* obliges the state to provide a fair trial and Article 13 ECHR requires that there be an effective remedy before a national authority. In the case of *Artico* the Court found a violation of Article 6 (3) (c) ECHR because the Italian authorities failed to act when the applicant's lawyer who had been appointed for legal aid purposes refused to take on the case.<sup>62</sup> But even where the ECHR does not explicitly oblige the state to act, a positive obligation can be inherent in the right.<sup>63</sup> For instance, in *Airey v Ireland*, the Court of Human Rights found that the lack of legal aid in separation proceedings constituted a breach of the right to respect for the private and family life guaranteed by Article 8 ECHR because the Irish state had failed to make accessible a judicial separation from the applicant's husband.<sup>64</sup>

In the case of *X and Y v The Netherlands*, the Court found a violation of Art. 8 ECHR because the rape of a mentally disabled person could not be prosecuted as Dutch law required that the victim herself had to file a complaint with the authorities where the victim was over the age of sixteen.

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<sup>62</sup> *Artico v Italy*, No. 6694/74, para 33.

<sup>63</sup> *Marckx v Belgium*, No. 6833/74, para 31; *Gaskin v UK*, No. 10454/83, para 41; the argument is that Article 1 ECHR obliges parties to 'secure' Convention rights.

<sup>64</sup> *Airey v Ireland*, No. 6289/73, paras 31-33.

The Court found that this gap in the legal protection could only be closed by criminal law.<sup>65</sup>

The question is, of course, in how far alleged omissions by the European Union might become the subject of a complaint. Considering that the EU has only very limited executive competences, cases directed against the EU will thus probably concern failures of the EU to legislate and shortcomings of EU primary law.

#### **a. Failures to legislate**

Cases involving alleged failures to legislate might prove especially problematic. While applications relating to family life, such as the one in *Airey*, will hardly ever have an EU law aspect to them, one can identify one group of cases, where the question of who is the correct respondent might become relevant: the case law concerning the right to a healthy environment protected as a sub-category of the right to respect for the home enshrined in Article 8 ECHR. In the case of *López Ostra* the Court held that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely [...].'<sup>66</sup> The court left it open whether the violation in *López Ostra* constituted an active interference by the state or an omission to comply with a positive obligation to take reasonable and appropriate measures to secure the applicant's rights.<sup>67</sup> It is clear from the case, however, that a positive duty to protect individuals from noise and emissions generally flows

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<sup>65</sup> *X and Y v The Netherlands*, No. 8978/80, paras 24-30.

<sup>66</sup> *López Ostra v Spain*, No. 16798/90, para 51.

<sup>67</sup> The question was also left open in *Hatton v UK*, No. 36022/97, para 119. In *Taskin v Turkey* the Court found a violation, No. 46117/99, paras 111-126.



from Art. 8 ECHR.<sup>68</sup> Thus there is an obligation on the contracting parties to offer such protection. The question against whom such cases of alleged failures to provide protection should be addressed.

#### **aa. Competences**

The most effective way of dealing with this question would be direct such applications against the entity which has the internal legislative competence. In the area of environmental law, Art. 192 TFEU provides for a shared competence between the EU and the Member States. This means that the Member States may only exercise their competence to the extent that the EU has not exercised its competence (Art. 2 (2) TFEU). Once the EU has legislated, the Member States lose their competence to legislate in that field. The Protocol on the exercise of shared competence clarifies that the exercise of the competence 'only covers those elements governed by the Union act in question and therefore does not govern the whole area'.<sup>69</sup> This would mean that an applicant would have to direct their application against the EU where the EU had already legislated in the area, or against the Member State where the EU had not. This approach would clearly necessitate an appreciation of the division of competences by the ECtHR, which would at first glance be incompatible with the ECJ's jurisdictional monopoly in this area.<sup>70</sup>

In the area of environmental law, however, an applicant would always seek a greater protection through environmental norms. According to Art. 193 TFEU Member States may adopt more stringent protective measures. This

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<sup>68</sup> Frowein/Peukert, Europäische Menschenrechtskonvention, N. P. Engel Verlag, Kehlheim 2009, Art. 8, para. 44.

<sup>69</sup> Protocol on the Exercise of Shared Competence, [2007] OJ C 306/158.

<sup>70</sup> Cf. Opinion 1/91 ECR I-6079.

would suggest that each Member State still has the competence to legislate even where the EU has exercised its shared competence. Thus one might conclude that an applicant can direct their application against their Member State, which can legislate, or against the EU, which also has the right to legislate. However, there are two problems with such a solution. First, in order for the EU to have the right to legislate, the requirements of the principle of subsidiarity laid down in Art. 5 (3) TEU must be satisfied. This would oblige the ECtHR to check its requirements, which again would endanger the autonomy of EU law, since it is only for the ECJ to adjudicate in this area. Second, deviations from rules on environmental law according to Art. 193 TFEU would still have to be 'compatible with the Treaties'. This implies that they must not interfere with provisions of primary law, such as the free movement of goods.<sup>71</sup> Again, this question is for the ECJ to decide.

Equally, in an area where the EU has chosen to use Art. 114 TFEU as the legal basis for harmonization, the question of the remaining competence of the Member State (e.g. under Art. 114 (5) TFEU) would still have to be determined by the ECJ.<sup>72</sup>

This means that a solution anchored to the division of competences is not acceptable for the EU when it comes to individual complaints regarding omissions.

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<sup>71</sup> Cf. ECJ C-203/96 [1998] ECR I-4075, para 35 et seq (Dusseldorp); C-389/96 [1998] ECR I-4473, para 16 et seq (Ahler-Waggon GmbH).

<sup>72</sup> On the correct legal basis in environmental law cf. Wolfgang Kahl, in: Calliess, Christian/Ruffert, Matthias, EUV/EGV, C. H. Beck, Munich 2007, Art. 95, para 73 et seq.

## **bb. Other Solutions**

Thus the question is which solution should be adopted? In principle, the same solutions as outlined above come to mind: there is the option of a joint liability, a joint and several liability, or the co-respondent model. For the reasons outlined above, a joint or a joint and several responsibility have considerable flaws.

In finding a solution, the main consideration should again be given to the effectiveness of human rights protection especially for individual applicants. It can at times be very difficult to distinguish between a complaint against an action and a complaint against an alleged failure to act. For instance, one of the areas of EU law which might come under scrutiny by the ECtHR is fines awarded by the Commission in competition law.<sup>73</sup> One of the critical issues will be the alleged failure of the ECJ and the General Court to explore the facts in such cases.<sup>74</sup> Whether the violation of Article 6 ECHR in such a case constitutes an action or an omission is debatable.

It is therefore argued that in nominating the correct respondent a similar approach to that for actions should be adopted. The crucial difference to the situation outlined above is that an applicant making a choice about whom to designate as the respondent does not have a previous action as a link for their decision. Any declaration by the EU and the Member States designating who is responsible in which cases would be flawed because of their necessary vagueness and resulting insecurity for the applicant.<sup>75</sup>

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<sup>73</sup> Cf. Jürgen Schwarze, *Rechtsstaatliche Defizite des europäischen Kartellbußverfahrens*, *Wirtschaft und Wettbewerb* (2009), 6.

<sup>74</sup> Cf. Schwarze, 10.

<sup>75</sup> Cf. *supra* on the vagueness of declarations of competence.

Therefore, the solution would be to allow the applicant to freely decide whom to hold responsible. Clearly this involves the danger of holding the wrong party to account. Here the co-respondent model could prove of great value. Should the respondent feel that they are wrongly being held to account, they should be allowed to ask the other to join the proceedings as a co-respondent. The applicant would not risk the application to be dismissed *ratione personae* as both the Member State and the EU would initially have to be deemed responsible. Where the ECtHR finds that there was a violation of the Convention, the decision will be binding on both. Moreover, the Court will not have to make any pronouncements on the division of competences between the EU and the Member States, which would preserve the autonomy of EU law. Where the Court finds a violation, the EU and the Member State concerned will have to come to an internal agreement as to who is responsible for remedying it.

The proposal has the further advantage of being simple in that the same rules will apply for actions and omissions. This means that an individual applicant would be not required to differentiate between an action and an omission, which can at times be very difficult. This procedural simplicity will again help to enhance the human rights protection for the individual.

## **b. Primary Law**

With regard to shortcomings in EU primary law, we can mainly think of cases involving violations of the judicial rights laid down in Articles 6 and 13 ECHR. One provision which might prove problematic in the future is Article 263 (4) TFEU, which provides for access to the ECJ against acts addressed to a

natural or legal person or acts which are of a direct and individual concern to them as well as against regulatory acts where such acts affect them directly and do not entail implementing measures. With the inclusion of regulatory acts the Lisbon Treaty may have managed to close an existing gap in the right to challenge such acts before the ECJ.<sup>76</sup> However, it will be for the ECJ to determine what constitutes such an act. Article 263 (4) TFEU might still prove to be an insufficient legal remedy.<sup>77</sup> Having established that there are no convincing arguments not to hold the EU responsible for violations found in primary law, an applicant will usually not have any difficulty in identifying the correct respondent. Especially where the applicant wants to enforce their judicial rights, it will usually be clear in which judicial system, European or domestic, the violation can be found.

#### IV. Conclusion

This contribution has only dealt with one of the many facets of an accession by the EU to the ECHR. It has attempted to show the strengths and weaknesses of various solutions to the question of the correct respondent in proceedings before the ECtHR. Whatever the solution will eventually look like, it is crucial that it takes into account the position of an individual applicant who has no counsel. Otherwise the effectiveness of human rights protection risks

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<sup>76</sup> This became evident in ECJ Case C-50/00 P [2002] ECR I-6677 (*Unión de Pequeños Agricultores v Council*); cf. especially the criticism voiced in his opinion by AG Jacobs, paras 102 et seq.

<sup>77</sup> Cf. for a recent discussion of this issue S. Balthasar, *Locus standi rules for challenges to regulatory acts by private applicants: the new art. 263 (4) TFEU*, *European Law Review* 2010, 542, who argues that regulations constitute 'regulatory acts'; a different stance is taken by D. Chalmers/G. Davies/G. Monti, *European Union Law*, 2nd edn., CUP, Cambridge 2010, 414-415.

being undermined by far too technical requirements for access to the Strasbourg Court.

This contribution was not able to discuss the ramifications of an accession for the state complaint under Article 33 ECHR or the future of the presumption in the *Bosphorus* decision.<sup>78</sup> Further open questions concern the position of an EU judge on the ECtHR and the participation of the EU in the supervision of the execution of judgments in the Council of Ministers under Article 46 (2) ECHR since the EU will not become a party to the Council of Europe and thus will not automatically have a seat in the Council of Ministers.

Moreover, it will remain to be seen whether the first accession of an international organization to a human rights treaty will set a new trend in motion which will lead to more similar accession in the future. For the EU, the next step might be an accession to the Council of Europe's European Social Charter.<sup>79</sup>

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<sup>78</sup> Cf. Tobias Lock, *The ECJ and the ECtHR: The Future Relationship Between the Two European Courts*, 8 *The Law and Practice of International Courts and Tribunals* (2009), 375.

<sup>79</sup> A proposal has been made by the European Parliament's Committee on Constitutional Affairs, *Draft Report on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (2009/2241(INI)), para 13.